

BEFORE THE BOARD OF REALTY REGULATION
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the petition)	NOTICE OF PETITION FOR
for declaratory ruling on the)	DECLARATORY RULING
issue of whether a real)	
estate broker or)	
salesperson, who is engaged)	
in property management,)	
shall provide relationship)	
disclosures as are provided by)	
§37-51-314, MCA, or as are provided))	
by ARM 8.58.714(3)(n))	

TO: All Concerned Persons

1. On December 12, 2003, at 1:00 p.m., in room B07, Park Avenue Building, 301 South Park Avenue, Helena, Montana, the Board of Realty Regulation will consider a petition for declaratory ruling on the following question:

"Shall a real estate broker or salesperson, who is engaged in property management, provide the relationship disclosures as are provided by MCA §37-51-314 or the disclosures as are provided by ARM §8.58.714(3)(n)?"

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or who need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Realty Regulation no later than 5:00 p.m., December 5, 2003, to advise us of the nature of the accommodation that you need. Please contact Grace Berger, Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 444-2961; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2323; e-mail dlibsdrre@state.mt.us.

3. This petition for declaratory ruling is submitted at the request of Merilynn J. Foss, Chair of the Property Managers Working Group of the Montana Association of REALTORS®, and the Montana Association of REALTORS®, Inc. (MAR) (Collectively the Petitioners).

4. Petitioners allege that licensed brokers and salespersons are subject to rigorous disclosure requirements pursuant to 37-51-314, MCA. On the other hand, licensed property managers are only required to disclose their contractual relationships pursuant to ARM 8.58.714(3)(n). Petitioners question which disclosure requirements are applicable to licensed brokers or salespersons who are engaged in property management.

5. The statutes and rules upon which the declaratory ruling is requested are 37-51-102(7), (8), (16), (20), (21), (22), (23), and (24), MCA, 37-51-314, MCA, ARM 8.58.419(3)(q), and ARM 8.58.714(3)(n), as set forth herein:

37-51-102 DEFINITIONS Unless the context requires otherwise, in this chapter, the following definitions apply:

...
(7) "Buyer broker agreement" means a written agreement in which a prospective buyer employs a broker to locate real estate of the type and with terms and conditions as designated in the written agreement.

(8) "Buyer subagent" means a broker or salesperson who, pursuant to an offer of a subagency, acts as the agent of a buyer.

...
(16) "Person" includes individuals, partnerships, associations, and corporations, foreign and domestic, except that when referring to a person licensed under this chapter, it means an individual.

...
(20) "Salesperson" includes an individual who for a salary, commission, or compensation of any kind is associated, either directly, indirectly, regularly, or occasionally, with a real estate broker to sell, purchase, or negotiate for the sale, purchase, exchange, or renting of real estate.

(21) "Seller" means a person who has entered into a listing agreement to sell real estate and includes landlords who have an interest in or are a party to a lease or rental agreement.

(22) "Seller agent" means a broker or salesperson who, pursuant to a written listing agreement, acts as the agent of a seller and includes a seller subagent and an in-house seller agent designate.

(23) "Seller subagent" means a broker or salesperson who, pursuant to an offer of a subagency, acts as the agent of a seller.

(24)(a) "Statutory broker" means a broker or salesperson who assists one or more parties to a real estate transaction without acting as an agent or representative of any party to the real estate transaction.

(b) A broker or salesperson is presumed to be acting as a statutory broker unless the broker or salesperson has entered into a listing agreement with a seller or a buyer broker agreement with a buyer or has disclosed, as required in this chapter, a relationship other than that of a statutory broker.

37-51-314 RELATIONSHIP DISCLOSURE REQUIREMENTS (1) A broker or salesperson shall disclose the existence and nature of relevant agency or other relationships to the parties to a real estate transaction as provided in this section.

(2) A seller agent shall make the required relationship disclosures as follows:

(a) The initial disclosure, as provided in subsection (6), must be made to the seller at the time the listing agreement is executed.

(b) If a broker or salesperson is acting as a seller subagent, a subsequent disclosure, as provided in subsection (7), must be made to the seller at the time negotiations commence.

(c) The subsequent disclosure established in subsection (7) must be made to the buyer or buyer agent at the time negotiations commence.

(3) A buyer agent shall make the required relationship disclosures as follows:

(a) The initial disclosure, as provided in subsection (6), must be made to the buyer at the time the buyer broker agreement is executed.

(b) If a broker or a salesperson is acting as a buyer subagent, a subsequent disclosure, as provided in subsection (7), must be made to the buyer at the time negotiations commence.

(c) The subsequent disclosure established in subsection (7) must be made to the seller or seller agent at the time negotiations commence.

(4) A statutory broker shall make the required relationship disclosures as follows:

(a) The initial disclosure, as provided in subsection (6), must be made to the buyer at the time the statutory broker first endeavors to locate property for the buyer.

(b) The subsequent disclosure, as provided in subsection (7), must be made to the seller or seller agent at the time negotiations commence.

(5) A buyer agent or seller agent who contemplates becoming or subsequently becomes a dual agent shall disclose the potential or actual relationship to the buyer and seller and receive their consent prior to the time or at the time that the dual agency arises. If the buyer agent or seller agent who contemplates becoming a dual agent has not previously given the buyer or seller the initial disclosure, as provided in subsection (6), the initial disclosure must be used, but if the initial disclosure has been given, any subsequent disclosures must take the form of the disclosure provided in subsection (7).

(6) The initial disclosure as required by subsections (2)(a), (3)(a), (4)(a), and (5) must be written and contain substantially the following information:

(a) a description of the duties owed by the broker and the salesperson as set forth in 37-51-313;

(b) a statement that reads as follows: "IF A SELLER AGENT IS ALSO REPRESENTING A BUYER OR A BUYER AGENT IS ALSO REPRESENTING A SELLER WITH REGARD TO A PROPERTY, THEN A DUAL AGENCY RELATIONSHIP MAY BE ESTABLISHED. IN A DUAL AGENCY RELATIONSHIP, THE DUAL AGENT IS EQUALLY OBLIGATED TO BOTH THE SELLER AND THE BUYER. THESE OBLIGATIONS MAY PROHIBIT THE DUAL AGENT FROM ADVOCATING EXCLUSIVELY ON BEHALF OF THE SELLER OR BUYER AND MAY LIMIT THE DEPTH AND DEGREE OF REPRESENTATION

THAT YOU RECEIVE. A BROKER OR A SALESPERSON MAY NOT ACT AS A DUAL AGENT WITHOUT THE SIGNED, WRITTEN CONSENT OF BOTH THE SELLER AND THE BUYER".

- (c) a definition of "adverse material fact";
- (d) identification of the type of relationship disclosed;
- (e) the signature of the seller or the buyer to whom the disclosure is given;
- (f) the signature of the broker or the salesperson making the disclosure; and
- (g) the date of the disclosure.

(7) The subsequent disclosure required by subsections (2)(b), (2)(c), (3)(b), (3)(c), (4)(b), and (5) or otherwise necessitated by a change or prospective change in a relationship described in a previous disclosure must be written, must contain the information required in subsections (6)(d), (6)(e), and (6)(g), and may be included in other documents involved in the real estate transaction. If a seller or buyer has not previously consented to the entry of the broker or the salesperson into a dual agency relationship, a subsequent disclosure must include all the information required in subsection (6), including the seller's or buyer's written consent to the dual agency relationship.

(8) Any disclosure required by this section may contain the following information:

(a) a description of the other relationships and corresponding duties available under this part, as long as the disclosure clearly indicates the relationship being disclosed;

(b) a consent to the creation of a dual agency relationship;

(c) other definitions in or provisions of this chapter; and

(d) other information not inconsistent with the information required in the disclosure.

(9) A written disclosure that complies with the provisions of this section must be construed as a sufficient disclosure of the relationship between a broker or salesperson and a buyer or seller and must be construed as conclusively establishing the obligations owed by a broker or salesperson to a buyer or seller in a real estate transaction.

8.58.419 GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT

...
(3) In addition to all other provisions contained in the statutes and rules administered by the board, failure to comply with any of the following shall constitute an act against the interest of the public:

...
(q) Licensees, while managing properties for owners, shall abide by the requirements of 37-51-607, MCA, and the requirements of the board of realty regulation's rules for property management as set forth in ARM 8.58.712 and 8.58.714;

...

8.58.714 GROUND FOR DISCIPLINE OF PROPERTY MANAGEMENT
LICENSEES - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT

...
(3) In addition to all other provisions contained in the statutes and rules administered by the board, particularly 37-51-606, MCA, failure to comply with any of the following will constitute an act against the interest of the public:

...
(n) Licensees shall disclose to all customers and clients their contractual relationship.
...

6. Petitioner Foss requests that the Board of Realty Regulation declare that a licensed real estate broker or salesperson, who is engaged in property management, does not need to provide relationship disclosures as provided in Montana Code Annotated Section 37-51-314 but rather, must provide disclosure as provided by ARM 8.58.714(3)(n).

Petitioner Montana Association of REALTORS®, Inc. does not advance a position but merely requests that the Board of Realty Regulation determine an answer to the question.

7. M. Gene Allison, attorney, has been designated to preside over and conduct this hearing.

8. The Board of Realty Regulation and Petitioners have identified the following as interested persons: The Montana Association of Realtors and all Montana licensed sales persons, brokers and property management agents.

9. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted by mail to Grace Berger, Board of Realty Regulation, Department of Labor and Industry, P.O. Box 200513, Helena, MT 59620-0513; by facsimile to (406) 841-2323; or by e-mail to dlibsdrre@state.mt.us and must be received no later than 5:00 p.m., December 11, 2003.

BOARD OF REALTY REGULATION
LAURA ODEGAARD, CHAIRPERSON

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State November 3, 2003.